

# EXHIBIT 2

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

NICHOLAS M. MARTIN, on behalf of  
himself and others similarly situated

Plaintiff,

vs.

JTH TAX, INC., doing business as  
Liberty Tax Service,

**Defendant.**

No. 13 C 6923

Chicago, Illinois  
September 16, 2015  
12:30 o'clock p.m.

**TRANSCRIPT OF PROCEEDINGS -  
Final Approval Hearing  
BEFORE THE HONORABLE MANISH S. SHAH**

## APPEARANCES:

For the Plaintiff:

BURKE LAW OFFICES, L.L.C.  
BY: MR. ALEXANDER H. BURKE  
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**For the Defendant:**

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BY: MS. REBECCA R. HANSON  
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#### Also Present:

Mr. Nicholas M. Martin, Plaintiff  
Ms. Kelly Kratz, Dahl Administration

COLLEEN M. CONWAY, CSR, RMR, CRR  
Official Court Reporter  
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1 (Proceedings heard in open court:)

2 THE CLERK: 13 C 6923, Martin versus JTH Tax.

3 MS. HANSON: Good afternoon, Your Honor. Rebecca  
4 Hanson on behalf of the defendant.

5 MR. BURKE: Good afternoon, Judge. Alexander Burke  
6 for the plaintiff.

7 MR. MAROVITCH: Good morning. Dan Marovitch for the  
8 plaintiff.

9 MR. BURKE: And also with us today, we have Nicholas  
10 Martin, the plaintiff, is here. And in the gallery, Your  
11 Honor, is Kelly Kratz, who's a representative from our class  
12 administrator, Dahl Administration, to answer any questions  
13 Your Honor may have.

14 THE COURT: Okay. Good afternoon. We're here for a  
15 final approval hearing on the proposed settlement.

16 I have the plaintiff's motion for final approval; I  
17 have the motion for attorneys' fees; I have the objections of  
18 Mr. Taishoff, T-a-i-s-h-o-f-f, Ms. Exum, E-x-u-m, Ms. Russell;  
19 the letter potentially objecting/potentially excluding  
20 Mr. Yoder; and then the recent correspondence, both from  
21 Mr. Taishoff and Ms. Exum.

22 Are there any other materials that I have and should  
23 acknowledge that I have and have reviewed?

24 MR. BURKE: Judge, there is a fee petition that the  
25 plaintiff filed --

1                   THE COURT: Right.

2                   MR. BURKE: -- some time ago. And I believe that is  
3 all.

4                   THE COURT: Okay.

5                   MR. BURKE: I did have some correspondence with Ms.  
6 Exum over the last few days, but I am not intending to submit  
7 that for the record unless I need to.

8                   THE COURT: Okay. Okay. No. And I did have the fee  
9 petition as well. So I do believe I have reviewed everything.

10                  We're also here for a hearing. No other participants  
11 have appeared today, so there are no objectors present,  
12 although this is the opportunity for any objectors to present  
13 additional objections or arguments.

14                  I did notice in the e-mail correspondence between  
15 counsel and Mr. Taishoff where he ultimately sent the  
16 affidavit, his supplemental affidavit. I think counsel told  
17 him that the hearing was set for 11:00 a.m. Central time, but  
18 the hearing is actually at 12:30 p.m. Central time.

19                  MR. BURKE: Yes.

20                  THE COURT: Luckily, Mr. Taishoff said he didn't have  
21 anything further that he wanted to say, so there was no harm  
22 done there in the communication about the time. I find that he  
23 knows full well that this hearing is happening and has had  
24 abundant opportunity to have his views expressed.

25                  Do the parties want to present any additional

1 evidence other than what's in the papers? And is there any  
2 update on the number of claims that we should talk about now?

3 MR. BURKE: We have updates on numbers, and I do have  
4 one suggestion or request.

5 I did -- I should notify the Court that the mailings  
6 to the three objectors were sent late. It was my fault. I  
7 filed the brief on a Friday evening and did not remember to  
8 mail those documents. So when I realized that -- when I  
9 received Ms. Exum's submission on Monday, I got on the phone  
10 and I called all three. I called Mr. Yoder as well, although I  
11 didn't reach him. I reached Mr. Taishoff, Ms. Exum, and Ms.  
12 Russell.

13 Both Ms. Exum and Mr. Taishoff indicated that -- I  
14 offered to ask for extra time for them to submit anything they  
15 wanted to. There's nothing allowed in the prior orders for a  
16 reply brief or anything like that, but I thought that it was  
17 equitable to at least suggest this.

18 Two class members indicated they did not want extra  
19 time. Ms. Russell requested that I ask for an extra two weeks  
20 for her to submit something, and so the date that we came up  
21 with was September 28th.

22 I have conferred with defense counsel, and defense  
23 counsel does not oppose this request, and I do not oppose the  
24 request. Again, there was no allotment in the preliminary  
25 approval papers for a reply brief, but I thought that it was

1 the right thing to do to suggest this, and so I am making the  
2 suggestion or the request.

3 THE COURT: Did Ms. Russell indicate in any way what  
4 her reply was going to be? Her objection itself was not a  
5 particularly substantive objection.

6 MR. BURKE: I received an e-mail from her, because I  
7 inquired again this morning as to whether she intended to  
8 submit something, and she said to me, "I need extra time  
9 because I'm not in agreement with the settlement amount to be  
10 paid out to me of \$36. September 28th is good timing."

11 THE COURT: Okay. Well, before I address that --

12 MR. BURKE: May I say one more thing --

13 THE COURT: Yeah, go ahead.

14 MR. BURKE: -- about that? I would say that the  
15 final approval papers were posted to the settlement website,  
16 which is publicly available, the day after we filed it. So  
17 September 1st, the papers were publicly available and I believe  
18 were properly served on the class in that manner.

19 I am not aware of any case law that requires me to  
20 mail these papers to the objectors, but I again thought it was  
21 the right thing to do.

22 THE COURT: Okay. Well, let me say what I was going  
23 to say up top.

24 MR. BURKE: Okay.

25 THE COURT: Because it was going to lead me to ask

1 whether I should keep going or whether people want more time,  
2 which is this, that I do intend to find that the proposed  
3 settlement is fair, reasonable, and adequate with the exception  
4 of the incentive award for reasons that I will explain.

5 I intend to find that a \$20,000 incentive award is  
6 disproportionate under the circumstances of this case and that  
7 \$10,000 is an appropriate award.

8 With that observation up-front, is there any reason  
9 for me not to proceed with my findings with respect to the  
10 remainder of the issues on the table?

11 I think I have the authority, even consistent with  
12 the terms of the settlement agreement, to adjust the incentive  
13 award and still approve the settlement agreement, but I wanted  
14 to pause --

15 MR. BURKE: Yes.

16 THE COURT: -- at this moment to see what the parties  
17 wanted to do.

18 MR. BURKE: Of course, Your Honor has that  
19 discretion, and I -- what comes to my mind is whether it would  
20 be constructive or whether Your Honor would like to hear a  
21 couple comments from me on the incentive award issue.

22 I have been working with Mr. Martin as his lawyer  
23 with respect to TCPA claims for quite some time. He -- I would  
24 frame him as a sort of champion of TCPA rights. In front of  
25 Judge Martin, we obtained a certified class, and class members

1 in that settlement received over \$600 each.

2 He perseveres in these cases despite real pressure  
3 from the defendant and probably from -- internally from himself  
4 to settle individually for a premium, and he does not generally  
5 do that and he did not do that in this case. Instead, he  
6 pushed through for the class.

7 Mr. Martin and I speak on the phone regularly about  
8 what's happening in the case, and we did in this case. There  
9 were a lot of difficult turns with discovery in this one, with  
10 the Philippines-based entity, the -- there was the auto-dialer  
11 company, the New York entity that was uncooperative with  
12 producing subpoena responses.

13 I would also say that Mr. -- I would note that  
14 Mr. Martin attended the mediation at JAMS and contributed  
15 materially at that mediation.

16 For those reasons, we would urge Your Honor to accept  
17 the proposed \$20,000 as an incentive award.

18 THE COURT: Okay. Assuming I am not persuaded, is  
19 there any reason I shouldn't continue in evaluating the  
20 settlement and entering an order? And I'll state more reasons  
21 about the incentive award as we get to it.

22 MR. BURKE: Understood. Some of the numbers  
23 immaterially changed. We've got, with some cures -- we sent  
24 out cure letters to 438 class members. So the number of timely  
25 claims is 39,381 as of today. It is possible that we may get

1 other timely postmarked cures in the future.

2 There is an issue of deficient claim forms, and those  
3 numbers, as identified in the papers, have also altered.

4 The total number of deficient claims forms as of --  
5 well, I think this is as of Monday, is 5,597. The same -- I  
6 believe the same number as before, 5,251, were submitted by  
7 class members, but they have the wrong phone number on them.  
8 438 were submitted by someone who appeared to be associated  
9 with a class member but had something wrong with it, like it  
10 was unsigned. And then 134 were received that had no apparent  
11 relationship to any class member.

12 I think that the -- you know, and so those are the  
13 change in the numbers.

14 THE COURT: The difference between the 5,251 and the  
15 5,597 is -- I guess is the 5,251 a subset of the 5,597 or are  
16 those two separate pools of deficient claims?

17 MR. BURKE: Subset.

18 THE COURT: Okay. And then is the difference --  
19 what's the difference like in terms of quality of deficiency or  
20 the reason for deficiency or --

21 MR. BURKE: Right. So the best but deficient claims  
22 are the 5251. Those are -- appear to have come from class  
23 members but have the wrong phone number. Then -- and, Judge, I  
24 haven't added these up. We were just going over them today.  
25 But 438 were unsigned. 134 appear to have no relationship to

1       the -- to any class member.

2           And I should say there is some float here because we  
3 have 346 that were cured of the unsigned. So we sent -- oh,  
4 gosh. We sent 572 cure letters. So these are -- we sent cure  
5 letters to all of the deficient claimants except for the 5251.

6           THE COURT: Okay. So the -- I am -- what I am trying  
7 to do is make sure I understand who would remain in the  
8 deficient category and not get a claim approved if I were to  
9 agree with the parties' proposal, which is that we should  
10 include the 5251 in the claims. And so we would be talking  
11 about some group of people whose claims were deficient and are  
12 not associated with a phone number that's been identified as  
13 being in the class.

14           MR. BURKE: So we sent out 572 cure letters and 226  
15 remain not responded to. Additionally, there are 426 late  
16 claims. That 426 is not included in the deficient numbers that  
17 I've been -- 426 late claims.

18           THE COURT: Okay. Well, I conclude that the 426 late  
19 claims should be allowed and the 5,251 deficient claims that  
20 are nevertheless associated reliably with a class member should  
21 also be allowed. Any other remaining claims that are deficient  
22 are deficient and won't be able to be compensated.

23           MR. BURKE: Perhaps other -- unless we receive a  
24 cure?

25           THE COURT: Unless a cure is received.

1                   MR. BURKE: Very well.

2                   THE COURT: And the claims administration process can  
3 take care of that.

4                   MR. BURKE: Yes.

5                   THE COURT: All right. Okay. So with those numbers  
6 in mind, I don't think that changes roughly our participation  
7 rates or our -- the overall benefit to individual claimants who  
8 are going to be receiving some compensation.

9                   MR. BURKE: It --

10                  THE COURT: Is that --

11                  MR. BURKE: It will modify things a little bit, but  
12 people will receive \$36, roughly, and it bumps our  
13 participation rate a few percentage points.

14                  THE COURT: Okay. Okay. Well, with those initial  
15 comments and findings and updates from the parties, is there  
16 anything the defense wants to submit or add other than what's  
17 in the papers?

18                  MS. HANSON: No, Your Honor.

19                  THE COURT: Okay. The notice, I find, was effective  
20 and advised the class of its rights and provided plain  
21 instructions. It reached over 90% of the individual members  
22 individually and was available online and more than adequately  
23 comported with the rule and due process in notifying the class.

24                  The class should be certified under Rule 23. It's a  
25 numerous class, over 290,000 phone numbers.

1           There are common issues particularly concerning  
2 whether there was an ATDS involved or not. The class members'  
3 claims are typical. It's all about whether they got the  
4 message without consent, and that makes each claim typical.

5           The plaintiff is an adequate representative. There's  
6 no reason to think that his claim is any different than any  
7 other class members. And class counsel has adequately  
8 represented the interests of the class. There's absolutely no  
9 indication here that there's any antagonistic issue between the  
10 class and class counsel or the class and the named plaintiff.

11           There are sufficient issues that predominate, namely,  
12 whether an ATDS was used. I think that that would predominate  
13 the case. And that class treatment is not only appropriate,  
14 but really the best way to have these kinds of claims litigated  
15 to resolution. And certainly resolving it as a class is better  
16 than having 291,000 separate claims.

17           My evaluation of the settlement is that it was and is  
18 a fair and reasonable and adequate settlement. There was risk  
19 in this case, and compromise makes sense here. Vicarious  
20 liability in a TCPA case is not without some risk. There is  
21 also significant third-party complexity here, the  
22 Philippines-based entity, as counsel mentioned earlier.  
23 Continued litigation would be costly. And, as we're about to  
24 see, the recovery for the class here through settlement is  
25 meaningful without having to endure protracted litigation, and

1 that has real value.

2 I do conclude from the response rates and what we've  
3 seen that the feedback from the class can and should be  
4 considered favorable toward the settlement. Given the number  
5 of people who bothered to take any step whatsoever, one way or  
6 the other, the number that were actually opposed is incredibly  
7 small, and I view that as a sign that there is little  
8 opposition amongst the class to this resolution.

9 The best assessment of the fairness of the settlement  
10 is to look at the outcome to the class. And in a case  
11 involving what I would conclude to be *de minimis* actual damages  
12 to any individual class member, 36 or 37 dollars is a good  
13 outcome. There are better outcomes that could be had, too, in  
14 a TCPA class action to individual class members. It's  
15 significantly less than statutory damages to any individual  
16 claimant, and I acknowledge that and appreciate that, but as a  
17 compromise, it is real money to each individual claimant that  
18 they would not have seen without this case that was brought by  
19 Mr. Martin. Given the nature of the claim and the violation, I  
20 think the outcome to each individual claimant is quite fair.

21 Let me address the objections. Ms. Russell's  
22 objection and her request for additional time to respond is --  
23 the objection is overruled and her request for additional time  
24 is denied.

25 I do find, like all members of the class, that she

1 had adequate notice of what was happening in the case. And if  
2 she had a substantive objection that was supported by something  
3 other than a feeling that what she's getting is not enough, she  
4 could have made that substantive objection in a more timely  
5 manner. And a reply is not required to be afforded to an  
6 objector and, in this particular objection's case, I think  
7 would not be useful to my evaluation of the overall settlement.

8 Her objection is that she wishes and wants more than  
9 what her individual claim is worth, and I understand that  
10 objection, and -- but it's overruled because it does not have  
11 the benefit of what I have the benefit of, which is an overall  
12 picture of the case as a whole. The benefit to the class as a  
13 whole, the elements of litigation, risk assessment, compromise,  
14 and the nature of a TCPA claim are all aspects that I think Ms.  
15 Russell and her objection don't adequately take into account.  
16 So for those reasons, her objection is overruled.

17 I also find that Ms. Exum has an unreasonable view of  
18 the individual value of her claim and a misunderstanding of the  
19 nature of class action such that her objection is also  
20 overruled.

21 She was given the option to exclude herself. And if  
22 she believes she has \$20,000 or more in damages, she has every  
23 incentive to pursue it, and she has chosen instead to object  
24 and not exclude herself, and her objection is overruled.

25 As I said before, I have the benefit of seeing the

1 overall picture of the case and the benefit to the class from  
2 this settlement, and the size of the class, and the nature of  
3 the violation, all of which leads me to conclude that Ms.  
4 Exum's evaluation of the settlement is not a reasonable one,  
5 and so her objection is overruled.

6 I also overrule her objection to the extent she's  
7 asking for a delay so that her complaint to the postmaster can  
8 be resolved. I find that she received the materials. She had  
9 sufficient time to voice her objection. I find that class  
10 counsel did not engage in any deception but to the contrary,  
11 actually reached out to her, spoke to her about her options,  
12 all in an appropriate manner, and advising her appropriately  
13 and consistently with counsel's responsibility to the class.

14 That she didn't like the option of exclusion is not  
15 evidence that class counsel is taking any step contrary to the  
16 interests of the class. And so accepting her description of  
17 events, I conclude that counsel has conducted himself  
18 appropriately.

19 She filed a document that has been docketed as a  
20 motion to object. So her motion to object is granted to the  
21 extent that her objection is made a part of the record. Her  
22 objection itself is overruled.

23 Mr. Taishoff -- is that how we pronounce it?

24 MR. BURKE: I believe so.

25 THE COURT: Okay. Mr. Taishoff has a similar

1 objection to the others, which I would call a small P political  
2 objection to class actions and the legal profession, or what  
3 has become of the legal profession as he has observed it over  
4 the years. And I appreciate those views, but they do not  
5 persuade me that this particular settlement is unfair or  
6 unreasonable or inadequate.

7 He does make an objection to the incentive award, and  
8 so I will talk about that in a moment. But other than that,  
9 his -- and his objection about the tax consequences not being  
10 adequately explained is also overruled. Those circumstances  
11 are available to all class members, and the class notice was  
12 sufficient and apprised the class of what the class needed to  
13 know.

14 The fee petition is approved, and the motion for the  
15 attorneys' fee award is granted.

16 The percentage recovery is reasonable. Percentage  
17 recovery is a reasonable fee in this type of case. Class  
18 counsel did take on the risk on the front end. The percentage  
19 here as a percentage of the overall benefit to the class is  
20 around 38%. That is more than a third, which is a benchmark in  
21 these types of cases. But this case did involve some  
22 additional risk or labor than the typical TCPA case because of  
23 the third parties involved.

24 There was a motion to dismiss which was not a  
25 particularly time-consuming motion to litigate as I look on the

1 docket, but there was also a mediation, all of which suggests  
2 that class counsel in no way colluded with the defense to sell  
3 out the class and obtain a big payday of the recovery.

4 Instead, I find that class counsel provided a good, fair  
5 outcome for the class and fairly vindicated the class' rights  
6 under the TCPA. And under those circumstances, the percentage  
7 is an appropriate value and compensation for class counsel.

8 And so that does take me to the incentive award. And  
9 I absolutely appreciate the need to have an incentive award  
10 that creates exactly what it says it is, which is an incentive,  
11 an incentive to bring these types of actions to champion the  
12 rights of the consumer, but what that doesn't do for me is  
13 distinguish this case from many other similar TCPA cases where  
14 smaller incentive awards have been awarded.

15 The amount of effort that Mr. Martin has put into  
16 this case is what I would characterize to be as standard and  
17 expected but not over and above the kinds of rigors that a  
18 named plaintiff who brings these kinds of cases should be  
19 expected to endure. What's been presented to me does not  
20 include any rigorous discovery that he had to defend against or  
21 sit through a contentious deposition or have his life  
22 scrutinized in a way that some named plaintiffs find.

23 The fact that he has been a plaintiff in other cases  
24 and has received an incentive award is noteworthy to me. It  
25 ultimately for me cuts a little bit in another way, which is

1 that I don't know that Mr. Martin needs additional incentive to  
2 bring these kinds of cases. And if he has the strength of  
3 character and resolve to be the champion that he is, he doesn't  
4 need the money to continue to be that standard bearer.

5 And at bottom, what I look at is the proportion of  
6 the incentive award to the overall benefit to the class. And  
7 the cases where \$20,000 or \$25,000 have been the award, where  
8 that is discussed and where -- it's not just a settlement where  
9 there are no objections and it was approved, but where some  
10 rigor was looked at in assessing the incentive award, those  
11 cases involving an award of that amount generally involve more  
12 money for the class or more effort or hurdles that the named  
13 plaintiff had to experience.

14 And there are some studies about the proportion of  
15 the fee incentive award to the class, and I think this is cited  
16 in Judge St. Eve's case, *Craftwood Lumber*, where the mean  
17 incentive fee award granted in consumer class actions is .08%  
18 of the total recovery.

19 An incentive award of \$20,000 here would be 1% of  
20 what the class gets, roughly, or .6% of the \$3 million, and  
21 that's significantly higher than the mean incentive award in  
22 consumer class actions. And there are some cases that talk  
23 about 1% being an amount that ought to be very heavily  
24 scrutinized.

25 And I flagged this issue at the preliminary approval

1 hearing, and what I have received in response, including the  
2 comments today, doesn't persuade me that \$20,000 is an  
3 appropriate award when viewed in proportion to what the class  
4 is getting and the efforts that Mr. Martin went through.

5 So I do conclude that \$10,000 is an appropriate  
6 incentive award. You know, obviously, if counsel wants to  
7 address that on his end, that's sort of up to you, but in terms  
8 of the incentive award that I am awarding, it's \$10,000.

9 I think I've covered everything that I need to cover  
10 in granting final approval, but if I am missing something,  
11 please tell me.

12 I should also add that the change in the incentive  
13 award does not, in my view, materially change the benefit to  
14 the class or the terms of what this settlement involves such  
15 that any additional notice or anything like that is necessary  
16 to the class. It really -- the class was well aware that the  
17 incentive award was subject to Court approval and would be  
18 considered. So what from the class' perspective would end up  
19 being a modest change in what they end up seeing is one that  
20 they had fair notice of potentially occurring, and so no  
21 additional notice would need to occur as a result of this  
22 modification.

23 That, I think, covers everything that I ought to  
24 cover.

25 MR. BURKE: I think so, too, Judge. Your comment

1 about -- at the end of what -- your comments about the  
2 incentive award --

3 THE COURT: We can -- any musings on my end that are  
4 not material to my decision on final approval are just that,  
5 musings. I mean, my decision on final approval is that the fee  
6 award is an appropriate fee award; that the appropriate  
7 incentive award is \$10,000; that the overall settlement of \$3  
8 million is a fair, adequate, and reasonable settlement for the  
9 class; that the class has adequate notice of the case and the  
10 terms of the settlement; that objections have been heard and  
11 ruled upon; and anything else I said was not material to the  
12 approval decision.

13 MR. BURKE: Very well. Thank you very much.

14 THE COURT: I think you sent a proposed order. Do  
15 you want to send another one?

16 MR. BURKE: I will, Judge. I looked at it before the  
17 hearing, and there are some things that need to be filled in  
18 that happened here, for example, who showed up. So we'll get  
19 that put together and we'll try to get it to you this  
20 afternoon, if not tomorrow.

21 THE COURT: Okay. When that comes in, I'll review it  
22 and likely enter it.

23 MR. BURKE: Thank you very much.

24 THE COURT: Okay. Thank you.

25 MR. MAROVITCH: Thank you, Your Honor.

1 MS. HANSON: Thank you.

2 (Proceedings concluded.)

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## C E R T I F I C A T E

I, Colleen M. Conway, do hereby certify that the foregoing is a complete, true, and accurate transcript of the proceedings had in the above-entitled case before the HONORABLE MANISH S. SHAH, one of the Judges of said Court, at Chicago, Illinois, on September 16, 2015.

/s/ Colleen M. Conway, CSR, RMR, CRR

08/24/16

Official Court Reporter  
United States District Court  
Northern District of Illinois  
Eastern Division

Date